

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-018205

10/17/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

SALVATORE FIORE

DINA R LESPERANCE

v.

PHYLLIS BIEDESS, et al.

LOGAN T JOHNSTON

STEVEN J DUFFY
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

This Court has jurisdiction of this administrative appeal pursuant to the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings before the Arizona Health Care Cost Containment System (“AHCCCS”), the Office of Administrative Hearings (“OAH”), the evidentiary hearing before this Court and the memoranda submitted by counsel.

1. Factual and procedural background

Plaintiff is a member of AHCCCS and has been enrolled with Mercy Care Plan (“MCP”), a contractor with AHCCCS to provide services to AHCCCS members. Plaintiff, Salvatore Fiore, is a 27 year man who suffers from a disabling condition known as Spina Bifida. As a result of the Spina Bifida, Mr. Fiore has considerable nerve damage which has left him incontinent.¹ A neurological deficit has destroyed the sphincter muscle which controls the bladder. Because this muscle is unable to function, it fails to contract, an action which allows an individual to hold urine in the bladder.² Involuntary spasms release fluid from Mr. Fiore’s bladder 7 to 10 times

¹ Testimony of Dr. Howard Norman, Transcript of Administrative Hearing, November 21, 2001 page 10, lines 9-13. (“Tr. ____”).

²² Tr. 10: 21-23).

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per day.³ Mr. Fiore testified that sudden bladder releases also occur as a consequence of simple bodily exertion, such as standing from a seated position.⁴ Mr. Fiore's urinary flow is constant. According to Dr. Norman, "there's really no way to control" neurological incontinence.⁵ Dr. Norman stated that Mr. Fiore is "at risk of ulceration and infection of the perianal area without proper care and adult diapers."⁶ Mr. Fiore testified that on two occasions during his life he developed painful skin ulcerations.⁷ Mr. Fiore testified that without the briefs he was afraid he would develop skin ulcerations from the constant wetness.⁸

Mr. Fiore's incontinence is not treatable with medication or catheterization.⁹ Mr. Fiore goes to great effort to keep himself as clean as possible but states that it is nearly impossible to keep himself dry because of the constant flow.¹⁰ Dr. Norman testified that it was reasonably certain that without the briefs, Mr. Fiore would eventually have skin ulceration.¹¹

In 2001, Mr. Fiore moved to Arizona from the state of New York. In New York, he was covered by Medicaid and the program provided him with coverage for incontinence briefs.¹² Plaintiff has been AHCCCS eligible since July 1, 2001 and has been enrolled with MCP throughout most of his period of eligibility.¹³

In August, 2001, Mr. Fiore's primary care physician requested authorization from MCP for incontinence briefs for Mr. Fiore. MCP denied coverage and Plaintiff appealed the denial of coverage. After an administrative hearing, the Administrative Law Judge ("ALJ") issued an order recommending that the Director of AHCCCS reverse MCP's denial of coverage for incontinence briefs because the briefs are "medically necessary."¹⁴ The AHCCCS Director rejected the ALJ's recommendation and denied coverage finding that the briefs were not "medically necessary" insofar as they are not needed to "treat a medical condition."¹⁵ Plaintiff moved for reconsideration which the AHCCCS Director denied.¹⁶ Plaintiff timely filed an appeal to this Court.

³ Tr. 6: 10-12.

⁴ Tr. 7: 1-4.

⁵ Tr. 11: 21-22.

⁶ Letter from Dr. Norman, October 17, 2001, Exhibit A to Plaintiff's Opening Brief; Tr., 12-13.

⁷ Tr. 16-17

⁸ Tr. 18.

⁹ Dr. Norman, Tr. 11: 25-27; Fiore, Tr. 15: 9-13.

¹⁰ Fiore, Tr. 7-8.

¹¹ Tr. 13-14.

¹² ALJ Decision, Findings of Fact ¶ 3.

¹³ ALJ Decision, Findings of Fact, ¶2.

¹⁴ Recommended Decision of Administrative Law Judge ("ALJ Decision"), November 23, 2001, Conclusions of Law, ¶ 8.

¹⁵ AHCCCS Director's Decision, December 20, 2001 ("Director's Decision"), ¶ 3.

¹⁶ AHCCCS Final Decision, August 5, 2002 ("Final Decision").

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This Court held an evidentiary hearing on March 24, 2003 to supplement the record. Testimony during the evidentiary hearing established that several months after the denial of his request for incontinence briefs, Mr. Fiore developed severe skin ulcerations.¹⁷ When Mr. Fiore developed skin ulcerations, MCP concluded that the incontinence briefs were necessary to treat a medical condition and approved the briefs to allow healing of the wounds.¹⁸ Once the skin ulcerations heal, MCP asserts that the provision of the briefs must be discontinued because they would no longer be necessary.¹⁹ Plaintiff contends that the denial of coverage for incontinence briefs is unsupported by the record and is contrary to law.

2. Standard of Review

The issues in this case concern whether and under what conditions AHCCCS regulations require coverage for incontinence supplies for a member that suffers from incontinence. On appeal of an administrative board's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was supported by substantial evidence, was contrary to law, was arbitrary and capricious, or was an abuse of discretion.²⁰ As to questions of fact, this court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.²¹ Questions of statutory interpretation involve questions of law and the appellate court is not bound by the administrative agency's conclusion.²² The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.²³ The question whether substantial evidence supports the agency decision is itself a question of law for de novo judicial review.²⁴

2. Discussion

The Medicaid program furnishes federal grants to states under a cooperative federal and state venture pursuant to Title XIX of the Social Security Act of 1935, as amended.²⁵ Medicaid benefits in Arizona are administered by AHCCCS.²⁶ The AHCCCS program contracts with health plans including MCP to provide eligible persons with covered health services. In order to

¹⁷ Evidentiary Hearing Transcript, March 24, 2003 ("Hearing Tr."), page 12.

¹⁸ Hearing Tr., 28-29.

¹⁹ MCP Medical Director, Hearing Tr., page 36.

²⁰ A.R.S. § 12-910(G), *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

²¹ *Petrilas v. Arizona State Liquor Board*, 129 Ariz 449, 452, 631 P.2d 1107 (App. 1981).

²² *Seigal v. Arizona State Liquor Board*, supra.

²³ *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

²⁴ *Havasu Heights Ranch and Development Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 387 (Ariz. App. 1990).

²⁵ 42 U.S.C. §§ 1396 et seq.

²⁶ A.R.S. § 36-2601 et seq.

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be a covered service, the service must be “medically necessary.”²⁷ The terms “medically necessary” are defined in rules adopted by AHCCCS:

“Medically necessary” means a covered service provided by a physician or other licensed practitioner of the healing arts within the scope of practice under state law to prevent disease, disability, or other adverse health conditions or their progression, or prolong life.²⁸

In addition, the Director of AHCCCS adopted a rule that provides that “[p]ersonal incidentals including items for personal cleanliness, body hygiene and grooming shall not be covered unless needed to treat a medical condition” and are provided in accordance with a prescription.²⁹

Pursuant to the statute and applicable rules, the Director concluded that Plaintiff had failed to meet his burden of showing that the incontinence briefs were medically necessary because, according to the Director, he failed to show that the briefs were needed to “treat a medical condition as required by A.A.C. R 9-22-212(F)(5).”³⁰ The Director reached this conclusion because the briefs were not required to treat any existing skin ulcerations.³¹ The Director said that because the record did not show any existing skin ulcerations, there was no medical condition to treat. In addition, the Director said “[t]here is insufficient evidence to conclude that adverse health conditions would occur absent the use of incontinence briefs.”³² For these reasons, the Director rejected the ALJ’s recommended decision and upheld MCP’s denial of coverage for incontinence briefs. AHCCCS denied reconsideration for essentially the same reasons.³³

a. Was AHCCCS’ action supported by substantial evidence?

Plaintiff contends that the Director’s action is not supported by substantial evidence. The record of proceedings before the administrative law judge includes expert testimony from Dr. Norman, Plaintiff’s primary care physician, that without incontinence briefs, Mr. Fiore would likely develop skin ulcerations and infections as a result of the chronic and uncontrollable wetness that results from the nerve damage associated with his Spina Bifida condition.³⁴ Mr. Fiore testified to the extraordinary measures he undertakes to maintain cleanliness and keep his skin free from urine. Mr. Fiore testified that in the past, when he was not using incontinence

²⁷ A.R.S. § 36-2907(A).

²⁸ A.A.C. R 9-22-101.

²⁹ A.A.C. R 9-22-212(E)(5).

³⁰ Director’s Decision, ¶ 3

³¹ Id.

³² Id.

³³ AHCCCS Final Decision, August 15, 2002.

³⁴ Tr. 12-13.

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briefs because he was hospitalized for surgery, he developed skin ulcerations.³⁵ Mr. Fiore testified that his skin condition had become worse since the time that Dr. Norman saw him.³⁶ That evidence is virtually undisputed in the record of administrative proceedings. Even Dr. Krauss Defendants' expert witness, testified that an individual with Spina Bifida and in the condition Mr. Fiore is in would be at risk for ulcerations and infection.³⁷ The evidence that without incontinence briefs, Plaintiff was at risk of developing skin ulcerations and infection is undisputed in the record. The question whether substantial evidence supports the agency decision is itself a question of law for *de novo* judicial review.³⁸ The Director's conclusion that Plaintiff had not established that any adverse health condition would result from the absence of incontinence briefs is in error, and contradicted by substantial evidence. Admittedly, much of the substantial evidence supporting the Plaintiff's position was developed and presented to this court at the evidentiary hearing, and considered for the purpose of determining whether such evidence was of such a character that it would likely change the decision of the Director.³⁹ The evidence presented by the Plaintiff to this court was clearly of such a nature that this evidence would change the decision of the Director, as the passage of time since the Director's decision has revealed that the lack of incontinence briefs would indeed cause Mr. Fiore to develop skin ulcerations.

During the evidentiary hearing before this Court, it was established that after the denial of coverage for incontinence briefs, Mr. Fiore did in fact develop skin ulcerations. Once Mr. Fiore had developed decubitus or stasis ulcers, the briefs were approved as medically necessary to foster the healing of the wounds.⁴⁰ Defendants' expert witness, MCP's Medical Director, testified that provision of the briefs must be discontinued once the infection dissipates.⁴¹ Defendant contends that the later approval of the briefs proves that MCP's position is correct. MCP will provide coverage for the incontinence briefs when they are medically necessary to heal the sores. In fact, the later development of skin ulcerations bolsters the undisputed evidence in the previous record that Plaintiff was at risk of developing this skin condition as a result of the uncontrollable and constant wetness that is a result of his Spina Bifida condition. The Director's conclusion to the contrary is not supported by the evidence.

b. Was AHCCCS' action contrary to law?

The legal issue presented by this appeal is not complex. Both parties agree that the applicable provisions of law are the statute that requires "medical necessity" for coverage, the

³⁵ Tr. 8, 19.

³⁶ Tr. 17-18.

³⁷ Testimony of Dr. Krauss, Tr. 22. Dr. Krauss also testified that, in his opinion, incontinence briefs were not "medically necessary" for Plaintiff but would be if Plaintiff developed skin ulcerations.

³⁸ *Havasu Heights Ranch and Development Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. at 387.

³⁹ See, *Shaffer v. Arizona State Liquor Board*, 197 Ariz. 405, 4 P.3d 460 (App. 2000).

⁴⁰ Hearing Tr., page 30.

⁴¹ Hearing Tr., page 36.

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rule that defines “medical necessity” to include prevention of adverse health conditions and the rule that excludes coverage for certain supplies “unless needed to treat a medical condition.”⁴² Plaintiff contends that with respect to his Spina Bifida and the resulting incontinence and skin ulcerations, incontinence briefs are “medically necessary” both to prevent an adverse health condition and to treat his Spina Bifida and its resulting conditions. Defendants contend that incontinence briefs are not “medically necessary” unless Defendant is actually experiencing skin ulcers or infections and that Spina Bifida is not a medical condition that can require incontinence briefs as part of its treatment.⁴³

The Director concludes that with respect to supplies, the prevention provision of “medically necessary” as defined in the regulation is inapplicable. The standard instead is whether the supplies are “needed to treat a medical condition” and that medical condition cannot include Spina Bifida and its adverse health effects.⁴⁴ Plaintiff contends that this reading of the applicable law is incorrect and is arbitrary and capricious. In essence, MCP and AHCCCS redefine medical necessity by excluding prevention from being considered with respect to coverage determinations that involve incontinence briefs. According to Defendants, the term “needed to treat a medical condition” trumps the definition of medical necessity and such treatment cannot include prevention of an adverse health condition. Defendants’ view of the law as it relates to Plaintiff’s severe disability and resulting incontinence is that prevention is of no consequence when considering whether to provide incontinence supplies to treat a medical condition. Defendants argue that incontinence briefs are only required when to treat existing skin ulcers or infections.

Interpretation of “medically necessary” in the AHCCCS statutes and regulations involves questions of law and this Court is not bound by the administrative agency’s conclusion.⁴⁵ However, a reviewing court generally accords great weight to the agency’s interpretation of statutes or regulations it implemented.⁴⁶ In this case, AHCCCS describes the requested incontinence briefs as “personal incidentals for personal cleanliness.”⁴⁷ In its Medical Policy Manual, however, AHCCCS distinguishes between “incontinent supplies” and “personal incidentals.”⁴⁸ In the Medical Policy Manual, the test for coverage of incontinent supplies is whether they are “medically necessary” which by definition includes prevention of adverse

⁴² A.R.S. §36-2907(A); A.A.C. R9-22-101; A.A.C. R9-22-212(E)(5).

⁴³ AHCCCS Final Decision, ¶ 7.

⁴⁴ AHCCCS Final Decision, ¶ 6.

⁴⁵ *Seigal v. Arizona State Liquor Board*, supra.

⁴⁶ *Marlar v. State*, 136 Ariz. 404, 411, 666 P.2d 504, 511 (App. 1983); *Romo v. Kirschner*, 181 Ariz. 239, 240, 889 P.2d 32, 33 (App. 1995).

⁴⁷ Final Decision, ¶ 6.

⁴⁸ AHCCCS Medical Policy manual, Chapter 300, Policy 310 Covered Services. With respect to medical supplies, the AHCCCS Manual provides:

AHCCCS does not cover the following medical supplies . . . :

1. Incontinent supplies (unless determined medically necessary)
2. Person incidentals including items for personal cleanliness, body hygiene and grooming (except to treat a medial condition under a prescription)

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health conditions. In the Manual, the “to treat a medical condition” test is applied to cleanliness and hygiene items but not to incontinent supplies. An agency manual is that agency’s interpretation of the statutes and regulations it implemented.⁴⁹ Defendants’ denial of coverage for incontinence briefs for Mr. Fiore is contrary to the agency manual in two respects. First, AHCCCS describes the incontinence briefs as personal incidentals requested for personal hygiene. Second, AHCCCS concludes that the briefs are covered only to treat a medical condition. The agency’s action is contrary to law, is arbitrary and capricious.

Defendants’ application of the law in the present case is incorrect. Mr. Fiore suffers a physiological condition which causes medically determinable incontinence. The record establishes that incontinence supplies are the only available preventative treatment for Mr. Fiore’s condition to prevent skin ulcers or infections. The incontinence supplies are necessary due to a severe medical condition and were prescribed by Plaintiff’s physician. It is arbitrary and capricious to exclude coverage of supplies without regard to the prevention aspect of medical necessity. An agency policy that does not respond to medical need is arbitrary and capricious. In the case of Mr. Fiore, incontinence supplies are a viable treatment and are medically necessary to prevent the skin ulcerations and infections he has developed when denied incontinence briefs.

Conclusion

This court heard persuasive and powerful evidence at the evidentiary hearing held long after the AHCCCS Director issued the decision in this case. That evidence strongly supported the position of the Plaintiff that denial of incontinence briefs was a denial of a medically necessary preventative treatment in his case because such a denial would directly result in skin ulcers or infections. The Director’s conclusions are not supported by all of the evidence, including that heard by this court. The Defendants’ application of the law also included incorrect and unduly restrictive definition of the terms “medical necessity”. For these reasons, the Defendants determinations in this case must be reversed.

IT IS THEREFORE ORDERED reversing the decision of the AHCCCS Director in this case.

IT IS FURTHER ORDERED granting all relief as requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED that counsel for the Plaintiff shall lodge an order and judgment consistent with this opinion, and its application for attorneys fees and costs, no later than November 21, 2003.

⁴⁹ *Arizona Dept. of Revenue v. Raby*, 204 Ariz. 509, 512, 65 P.3d 458, 461 (App. 2003).